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In the Supreme Court of the United States

OCTOBER TERM, 1987

EDWARD J. HALLORAN, APPELLANT

v.

STATE OF NEW YORK, APPELLEE

On Appeal from the Supreme Court of New York, Appellate Division, First Department

REPLY BRIEF FOR THE APPELLANT

FREDERICK P. HAFETZ
JEREMY GUTMAN
Goldman & Hafetz
60 East 42nd Street
New York, N.Y. 10165
(212) 682-7000

ANDREW L. FREY
Counsel of Record
KENNETH S. GELLER
MARK I. LEVY
Mayer, Brown & Platt
2000 Pennsylvania Avenue, N.W.
Washington, D.C. 20006
(202) 463-2000
Counsel for Appellant

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REPLY BRIEF FOR THE APPELLANT

The State's motion to dismiss largely ignores the issues presented in our jurisdictional statement, preferring instead to answer irrelevant arguments of its own making. But that tack cannot obscure the substantial questions raised in this case. The State does not dispute that this appeal is properly within the Court's mandatory jurisdiction under 28 U.S.C. § 1257(2), and it has offered no adequate justification for the Court summarily to dispose of the appeal, thereby establishing a binding nationwide precedent without the benefit of full briefing and oral argument.

I

Our jurisdictional statement demonstrated (at 13-19) that the "preponderance of the evidence" standard prescribed in New York's alternative fine statute raises serious unresolved issues under the Due Process Clause.

Under this statute, the maximum allowable punishment is not legislatively fixed but is instead entirely a function of the amount of the defendant's "gain" as found by the sentencing court in a judicial proceeding.

The alternative fine statute stands in marked contrast to the typical criminal statute of the sort the Court considered in *Williams* v. *New York*, 337 U.S. 241 (1949), and *McMillan* v. *Pennsylvania*, 477 U.S. 79 (1986), under which a conviction subjects the defendant to any sentence, in the discretion of the court, within a legislatively specified range of penalties. Although *McMillan* held that the "preponderance" standard was constitutionally sufficient for that kind of sentencing provision, the Court acknowledged that a different question would be presented by a statute that increases the maximum allowable punishment based on a post-trial factual determination. See J.S. 14-15. The New York alternative fine statute squarely presents that question.

Despite this, the State seeks to defend the statutory "preponderance" standard by a rote citation (Mot. to Dis. 26-27) to the conventional sentencing provisions considered by the Court in *Williams* and *McMillan*. There is not a single word in the State's submission that addresses the due process issue for a statute that—like the alternative fine statute in this case and unlike the statutes in *Williams* and *McMillan*—fixes the *maximum* penalty authorized by law on the basis of a court's post-verdict factual determination. The State's stubborn refusal to acknowledge and respond to our argument is a telling indication—indeed, a virtual concession—of its inability to answer this contention.[1]

Having basically ignored the merits of the due process issue, the State asserts two reasons why this important

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[1] Nor does the State distinguish the forfeiture cases discussed in the jurisdictional statement (at 19a), conceding instead that the alternative fine statute does have "some analogies to forfeiture" (Mot. to Dis. 27 n.8).

question is not presented in this case. First, it claims that the sentencing court in fact applied a higher standard than "preponderance of the evidence" when it stated that "[t]he amount of the gain" due to the appreciation of appellant's properties in which the kited funds were invested was established " 'without evidentiary contradiction' " (Mot. to Dis. 23, quoting J.S. App. 8a). We carefully explained (at J.S. 17-19) the importance of the burden of proof to the finding of "gain" in this case, and the State has offered no serious rebuttal. The passing statement of the sentencing court on which it relies utterly fails to support the State's position.

To begin with, it is simply specious for the State to contend that the amount of appellant's gain was uncontradicted, for the defense put on extensive testimony at the sentencing hearing—comprising nearly 70 pages in the transcript—to dispute the prosecution's claim of gain. Furthermore, to say that the evidence was "uncontradicted" indicates nothing about the stringency of the standard used to assess its sufficiency; even unrebutted evidence can fail to satisfy the "reasonable doubt" or "clear and convincing evidence" standard. Finally, since the New York statute expressly prescribes the "preponderance" standard, it is unrealistic to assume that the sentencing court, without explanation, would have elected to follow a higher (and unspecified) standard.

The State's second avoidance argument is that the due process issue was not properly preserved in the sentencing court (Mot. to Dis. 19-22). However, as the jurisdictional statement pointed out (at 8 n.3), appellant did raise the issue at sentencing, arguing that the imposition of an alternative fine "at a summary proceeding * * * without rigorous evidentiary standards" would violate due process (A.D. App. A100).

Furthermore, the State acknowledges (Mot. to Dis. 16) that the issue was presented to the Appellate Division.

This sufficed to preserve it for review in this Court unless the New York courts in fact refused to reach the issue on an adequate and independent ground of procedural default. *E.g.*, *Hathorn* v. *Lavorn*, 457 U.S. 257, 262-264 (1982). Here, however, the State's brief in the Appellate Division made no claim of procedural default in connection with the burden-of-proof issue. It is highly unlikely that the court would *sua sponte* have combed the record for potential procedural problems, or, had it done so, would have found appellant's invocation of the issue in the trial court to have been inadequate. Thus, the only logical conclusion is that the Appellate Division rejected the due process claim on the merits, along with the other issues briefed to it that were indisputably preserved. See *Ulster County Court* v. *Allen*, 442 U.S. 140, 152 (1979) ("[T]he prosecution never argued to any state court that a procedural default had occurred. This omission surely suggests that the New York courts were not thinking in procedural terms when they decided the issue").[2]

II

The second issue presented in the jurisdictional statement concerns whether the alternative fine statute as applied in this case violates the Eighth and Fourteenth Amendments because it authorizes a constitutionally excessive fine that far exceeds appellant's gain from the offense and includes profits unrelated to the offense (see J.S. 20-24). Again, the State ducks rather than confronts the troublesome questions we have raised. Its

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[2] The cases on which the State relies (see Mot. to Dis. 20), such as *Board of Dirs. of Rotary Int'l* v. *Rotary Club*, 107 S.Ct. 1940 (1987), involved the totally different situation in which the highest state court wrote an opinion that did not address an issue *not* presented to it, then denied without opinion a petition for rehearing that presented the issue for the first time. In such circumstances, this Court was prepared to presume that the denial of rehearing did not constitute a decision on the merits.

principal line of attack is to bandy about various large—but either irrelevant or erroneous—numbers concerning appellant's check kite. While these factual aspects of the case have limited bearing on its suitability for review, we cannot let the State's misleading assertions pass unanswered.[3]

The State repeatedly invokes (Mot. to Aff. 4, 6, 9, 15, 16, 24, 34, 52) the figure of $9.2 billion as a measure of the magnitude of the offense. That figure reflects the sum of all checks passed back and forth between the two accounts during the kite. But the magnitude of the scheme to defraud of which appellant was convicted depends not on the face amount of the kited checks passing harmlessly back and forth between the two banks (see *United States* v. *Kucik*, No. 87-2035 (7th Cir. Apr. 21, 1988), slip op. 2), but on the amount of money extracted from the kite and applied to appellant's own use.

The alleged aggregate increase in appellant's net worth during and after the kite, which the State repeatedly trumpets (Mot. to Aff. 6, 9, 12, 17, 34, 35, 37, 38, 48) as having been $100 million, is also beside the point. The fine was based on the appreciation in the specific properties in which the kited funds were invested, and, as the jurisdictional statement demonstrates, the Constitution would not permit a fine based on "gain" that was

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[3] We also feel obliged to respond to the State's transparent effort to prejudice the Court's view of the case by offering (Mot. to Dis. 7-9) an immaterial but highly inflammatory characterization of appellant's defense at trial. Contrary to the State's description, the record shows that appellant "didn't feel entitled" to obtain money by a check kite (Trial Tr. 2123) and acknowledged that it was "wrong" and "improper" to engage in the kite (*id.* at 2050, 2065, 2169). The State's pejorative statements appear to be based on a distortion of appellant's testimony that he believed his actions, while wrong, were not illegal because he intended to repay the funds (*id.* at 2050, 2065, 2124), and that he thought he was "entitled to [a] *loan*" and the banks had unjustifiably turned down his request for one (*id.* at 2048-2049 (emphasis added)).

untainted by the offense. Beyond that, *the State's $100 million appreciation figure is simply wrong*, and the associated discussion of appellant's wealth is grossly misleading. The financial statements cited by the State unequivocally show a *decline* in the net realizable value of appellant's assets during the kite period from $64 million in 1983 to $48 million in 1984. A.D. App. A668, A670; see also Tr. 1914.[4]

The State contends (Mot. to Dis. 32, 41) that no issue of excessiveness is presented because the fine was less than twice the gain found by the trial court, so that the statute would have permitted a considerably larger fine. Contrary to the State's apparent assumption, however, we are not challenging the enhancement feature of the alternative fine statute. The constitutional vices in appellant's fine would be precisely the same if the statutory measure of the penalty were the defendant's actual gain; in neither instance could the State constitutionally impose a fine based on gain that is *unrelated* to a defendant's profits from the offense. In fact, the jurisdictional statement demonstrates that appellant gained little from the kite, and therefore the constitutionally permissible basis for calculating the fine does not even begin to approach one half of the $25 million fine actually imposed.

On the merits, the State once again gives only passing attention to the issues we have raised, and even then it ignores or misunderstands the substance of our contentions. Rather than quibble over the details of the few points to which it attempts any meaningful response, we rely upon the legal arguments and factual explanation set forth in the jurisdictional statement. For notwith-

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[4] It was argued to the jury that appellant's assets of $71 million, consisting of the $48 million of net asset value plus the $23 million derived from the kite, amply sufficed to assure his ability to repay the money taken from the banks, but this was not based on any claim that appellant's wealth had actually increased as a result of the kite.

standing the State's characterization (Mot. to Dis. 31, 37), the point of our argument is not to seek redetermination by this Court of the factual findings of the sentencing court. Instead, we have shown that the sentencing court relied on a constitutionally impermissible legal theory for calculating gain and included in the fine several categories of so-called "gain" that render appellant's punishment violative of the Eighth and Fourteenth Amendments. That showing stands unrebutted by the State and presents a federal issue that warrants this Court's review.

III

The New York alternative fine statute failed to give constitutionally required fair notice of the state courts' sweeping and unprecedented interpretation of the term "gain." See J.S. 24-29. The State concedes (Mot. to Dis. 42) that the due process requirement of fair notice is applicable to the penalty provisions of a statute. In addition, it recognizes (*id.* at 43-46)—indeed, it extols—the expansive nature of the state courts' construction here.

The State's principal argument consists of repeated citations (mostly in civil contexts) to the general policy of New York to "take 'the profit out of crime'" (Mot. to Dis. 43). But at best, that suggests only that the legislature could have passed a law that authorizes the fine the sentencing court imposed here; it says nothing about whether the alternative fine statute is in fact such a provision. The State simply has failed to show any connection between this asserted "'public policy * * * in all civilized countries'" (*ibid.*)—usually not embodied in criminal fines—and the fair notice the alternative fine statute gives of what *it* means. In fact, our more natural reading of the term "gain" also "takes the profit out of crime" and subjects defendants to fines measured by the amount of their criminal profits.

The actual history of the application of the alternative fine statute provides the best indicator of its reasonable meaning. Under the State's theory of "gain," it certainly would be expected that at some prior time during the statute's 20-year life prosecutors would have proposed, and courts would have imposed (or at least considered), this sort of fine in one of the innumerable cases involving pecuniary crimes to which the State's interpretation would have applied. See J.S. 25-26. Yet the State has been unable to cite even one other case to belie the trial court's candid acknowledgement that "no fines of this nature [have] ever [been] ordered before" (J.S. App. 12a).[5] Furthermore, the State entirely ignores the point (J.S. 26-27) that its position unreasonably interprets the alternative fine statute to do *sub silentio* what the legislature did explicitly and in careful detail in the distinct forfeiture provisions of New York law.

Finally, the lack of fair notice here resulted in actual prejudice to appellant in the sentencing proceeding, for it allowed the prosecutor to use appellant's trial evidence against him at sentencing—evidence that was introduced

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[5] The State has managed to scrape up one example from the bottom of its barrel, *People* v. *Sohayegh* (N.Y. Sup. Ct. 1986), New York L.J., June 11, 1986, at 12 (see Mot. to Dis. 48-49). One instance, even if apt, would hardly be compelling evidence of the reasonably understood meaning of the statute. In any event, *Sohayegh*—which was decided more than two years *after* appellant's activities had occurred—did not involve the same theory of "gain." In that case a landlord was convicted of using "goon squads" to drive tenants from his building so that he could sell it at a higher price, and the court measured the defendant's gain by the difference in the value of his property with and without lessees. In making that determination, the court, contrary to the State's assertion here, specifically excluded general market appreciation in value that was "independent of any of the defendant's crimes" and "attributable to market trend, and not to the crimes themselves." *Sohayegh* would be analogous to the present case only if the court had based its fine on the landlord's profit from his subsequent investment of the proceeds of the sale of his building.

without any warning to appellant or his counsel of that risk. See J.S. 24-25, 27-29. The State admits that the sentence was based "on appellant's own trial testimony and evidence" (Mot. to Dis. 34). But, exhibiting a lack of understanding that we suspect is not inadvertent, it unjustifiably recasts our argument to suggest that appellant would have presented a false defense if he had had fair notice of the meaning of the alternative fine statute.

Thus, the State finds (Mot. to Dis. 51) something suspicious in our statement (J.S. 28) that appellant's trial presentation would have been "both more circumspect and more precise" on the issue of appreciation if counsel had been aware of the State's sentencing theory. As our discussion makes crystal clear (and the State does not controvert), appellant had sufficient assets at all times to repay the kite, and he had no need whatever to prove any appreciation in the value of those assets in order to support his defense on the felony counts (which the jury accepted) that he intended to return the kited funds to the banks. Accordingly, if appellant had known that the prosecutor could turn such evidence against him at sentencing, he plainly could have and would have based his defense on the untainted value of his assets and either not relied on or carefully explained any appreciation during the kite period. Notwithstanding the State's suggestion of "dishonesty" (Mot. to Dis. 51), such a defense strategy would have been perfectly proper, and it was highly prejudicial to appellant that he was deprived of that approach and led into a self-incriminatory trap by the absence of statutory fair notice.

CONCLUSION

For the foregoing reasons and those stated in the jurisdictional statement, probable jurisdiction should be noted.

Respectfully submitted.

FREDERICK P. HAFETZ
JEREMY GUTMAN
Goldman & Hafetz
60 East 42nd Street
New York, N.Y. 10165
(212) 682-7000

ANDREW L. FREY
Counsel of Record
KENNETH S. GELLER
MARK I. LEVY
Mayer, Brown & Platt
2000 Pennsylvania Avenue, N.W.
Washington, D.C. 20006
(202) 463-2000
Counsel for Appellant

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